STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

vs **Supreme Court**
No. 150789

CHARLES JEROME DOUGLAS,

Defendant-Appellant.

Court of Appeals No. 315027
Lower Court No. 12-010051-FH

The People's Brief in Opposition to Defendant's Application for Leave to Appeal

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Table of Contents

Page

Table of Authorities

Cases

Michigan

Federal

Supreme Court

Court of Appeals

Other States

Counterstatement of Jurisdiction

The People accept the Statement of Jurisdiction set forth by Defendant.

Counterstatement of Questions Involved

I. To sustain a claim of ineffective assistance of counsel warranting new trial, a defendant must establish deficient performance on the part of his trial counsel, and also that there is a reasonable probability that, but for counsel's error, the jury would not have convicted him; the likelihood of a different result must be substantial, not just conceivable. While the two officers who testified that they saw Defendant throw a gun over the fence gave inconsistent testimony about the direction that Defendant ran in, both testified consistently with one another that Defendant ran to the rear of 19140 St. Marys. Has Defendant shown that had his trial counsel argued the inconsistency, the jury would have acquitted him?

The People answer no.
Defendant answers yes.

II. If a particular sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. Defendant did not raise his scoring issue in any these methods, and his minimum sentence of 24 months is within the Guidelines range that he argues is the correct range, that being 5 months to 46 months. Is there any basis for setting aside Defendant's sentence?

The People answer no.
Defendant answers yes.

III. In reviewing a sufficiency of the evidence claim, the reviewing court will give deference to the trier of fact's credibility choices. Three police officers testified that they saw Defendant throw a handgun over the wooden fence in the rear of 19140 St. Marys, and two of the police officers testified that Defendant took this handgun out of his right waistband. Was the evidence sufficient to support Defendant's convictions?

The People answer yes.
Defendant answers no.

IV. A description of tangible evidence is the equivalent of the physical production of the evidence, and the failure to produce it goes at most to the weight of the evidence and the credibility of the witness describing it. Three police officers described the handgun that Defendant tossed over the wooden fence. Does Defendant's unpreserved due process/fair trial claim due to the nonproduction of the gun at trial entitle Defendant to any relief?

The People answer no.
Defendant answers yes.

Counterstatement of Facts

Defendant was charged in a criminal Information in the Third Judicial (Wayne County) Circuit Court with the following offenses: Count I: felon in possession of a firearm, in violation of MCL 750.227f; Count II: carrying a concealed weapon, in violation of MCL 750.227; and felony firearm, in violation of MCL 750.227b.

It was alleged that these offenses occurred on October 9, 2012.

The matter was tried before a jury with the Ulysses W. Boykin presiding.

Following the jury trial, Defendant was found guilty as charged.

Jury Trial

The evidence at trial included the following:

Witnesses

Prosecution

Detroit Police Officer Alen Ibrahimovic

Detroit Police Officer Alen Ibrahimovic testified that he was currently assigned to the Special Operations Unit within the Detroit Police Department (Jury Trial Transcript, 01/16/13 (PM Session), 19). He had been a police officer for four years, and had been in Special Operations that long (20). The work of the Unit focused on guns and narcotics (20).

He was on duty on October 9, 2012, along with his partner Officer Calvin Lewis (20; 23). At around midnight, he heard shots fired in the area that he and his partner were in (21). They decided to canvass the area in their fully marked police vehicle, going in the direction of where he had heard the shots (23). Defendant was walking in the middle of the street in the area of 19410 St.

Marys where there was a sidewalk provided (21; 24). They pulled up their vehicle closer to Defendant to investigate him (24). He was going to ask Defendant if he had heard any shots in the area (24). As they got closer to Defendant, Defendant looked in their direction (25). He was able to see Defendant's face at that point because he had his flashlight on Defendant (25). Before he was able to ask Defendant if he had heard any shots in the area, Defendant aggressively grabbed the right side of his waistband and began running westbound between the houses (25). Based on his experience as a police officer, he believed that Defendant's act of grabbing the right side of his waistband meant that Defendant was armed (26).

As soon as Defendant started running, he (the witness) exited the police vehicle and gave chase on foot (25). His partner also got out of the police vehicle and gave chase (26). When they got to the rear of what was 19411 St. Marys (sic), he observed Defendant reach into the same area of his waistband that he was clutching before he started running (27). Defendant pulled out a silver handgun and tossed it over a six foot wooden fence (27-28). He saw the handgun before Defendant tossed it because Defendant's shirt was out of his pants at that point (31). Before that, the handgun had been completely concealed because it was covered by Defendant's shirt (31).

While his partner and Sergeant Osman detained Defendant, he (the witness) went over the fence and recovered the handgun from the backyard next door (28). The handgun was about two feet away from the fence (29). The handgun that he recovered was silver, just like the handgun that he had seen Defendant pull from his waistband (29). He placed the handgun on evidence tag E 45565704 (29-30).

On cross-examination, the witness was asked what Defendant was wearing (33). The witness responded that Defendant was wearing a long-sleeved gray shirt and blue jeans (33). When

asked if Defendant was wearing a coat, the witness responded that he was not (33). The witness was asked to review his testimony from the preliminary examination (33-35). The witness acknowledged that at the preliminary examination, he had testified that Defendant was wearing a coat (35).

Detroit Police Officer Calvin Lewis

Detroit Police Officer Calvin Lewis testified that he had been a Detroit police officer for 12 years (Jury Trial Transcript, 01/16/13 (PM Session), 43). He was currently assigned to Special Operations at the Second Precinct (43). He was so assigned on October 9, 2012 (44).

On the above date, shortly after midnight, he and his partner, Officer Alen Ibrahimovic, were in their fully-marked police vehicle (43-44). He was driving their police vehicle (45). As they were driving westbound on Seven Mile Road, approaching St. Marys, he heard several gunshots ring out in the area (45-46). He decided to follow where he thought that the shots were coming from, and he turned right onto St. Marys (45).

As he drove northbound on St. Marys, he saw Defendant, who he identified in court, walking in the street (46). He wanted to talk to Defendant to see if Defendant had heard the gunshots (46-47). He pulled up alongside Defendant, to where Defendant was on the passenger side of their police vehicle (47). Defendant turned back and looked in the direction of their police vehicle (47). Defendant then started to run, holding his waistband as he ran (47). Defendant ran up the driveway of 19410 St. Marys (47). The way that Defendant was holding his waistband indicated to him, based on his police experience, that Defendant was armed (47).

Upon observing what he observed, he (the witness) exited the police vehicle and followed Defendant up the driveway of 19410 St. Marys (48). He saw Defendant toss the handgun over a six-

foot wooden fence (50). After Defendant did that, he (the witness) grabbed Defendant and passed him off to Sergeant Osman (50). Since his partner was about 5'8", he (the witness) stepped on a rock to look over the fence into the backyard next door (50). He illuminated the next door backyard with his flashlight, and saw the handgun laying a good five or ten feet away from the rear of 19140 St. Marys, where it had landed in the driveway (50). His partner went over the fence, and he helped his partner climb over (51). His partner recovered the handgun (51).

After his partner recovered the handgun, he (the witness) turned and grabbed Defendant, and walked Defendant out to his and his partner's police vehicle (51). At the police vehicle, he searched Defendant, and recovered from Defendant's jacket pocket a plastic baggie containing five live rounds that matched the rounds already in the handgun (51).

Defendant was wearing a gray shirt and a black or blue jacket (51).

On cross-examination, the witness testified that he was the first one to exit the police vehicle (53). He also testified on cross that he illuminated the rear of the house, and told his partner exactly where the handgun was (55). That was before his partner jumped the fence and retrieved the handgun (55).

Detroit Police Sergeant Todd Eby

Detroit Police Sergeant Todd Eby testified that he was the officer in charge of this case (Jury Trial Transcript, 01/16/13 (PM Session), 58). As officer in charge, he received the handgun that had been placed on evidence tag E 45565704 (59). He described what was on the this evidence tag as a Cobra brand nickel-plated .380 caliber automatic weapon (59). There were five live rounds inside of the gun (59-60). He was unable to trace the gun to the owner because the serial number on the gun had been defaced (59).

He sent the handgun to the Michigan State Police, Crime Lab with a variety of requests, one being to see if the Lab could ascertain the serial number on the gun (59). The procedure for deliveries to the Crime Lab was that deliveries were made every Friday, so that the Lab would have received the gun on the first Friday after October 9, which was the day of the incident (60). Then, once a trial date was established, the assistant prosecutor assigned to the case would call the State Police Crime Lab to advise them of the trial date, so that any test requested could be done in time for the trial (60-61). A couple of days before the trial date in this case, he (the witness) called the Northville Crime Lab (61). A lab technician at the Crime Lab advised him that the Lab had indeed been advised of the trial date in this case, but that the handgun was stuck in back-log, due to the processing of evidence with higher priorities, such as homicides (61). He then called the night before this trial began, and was advised that the gun was still stuck in back-log (61). Accordingly, the handgun was not in court (62). He had seen the handgun, however (62).

Defense

Detroit Police Sergeant Michael Osman

Detroit Police Sergeant Michael Osman testified that he was on duty on October 9, 2012 (Jury Trial Transcript, 01/16/13 (PM Session), 69). He was on patrol with other officers in the area encompassing 19140 St. Marys (69). He was following the patrol vehicle in front of him (69). The officers in that patrol vehicle were Officers Ibrahimovic and Lewis (70).

He followed the other patrol vehicle that was in front of him to a location where he observed Defendant walking in the street (70). He saw the officers in the patrol car in front of him slow down, and then he saw Defendant look in the direction of the officers, grab his right side area, and take off running to the rear of 19140 St. Marys (70). He saw the two officers get out of their vehicle

and chase after Defendant (70), and he pulled his own vehicle up in the driveway that Defendant had run up, and he then got out of his own vehicle and gave chase (72). He saw Defendant toss a gun over the fence and into the next yard over (70). The gun that he saw Defendant toss was a silver gun (73). Although it was around midnight, and dark, he recalled there being some light by which he could see the silver gun, whether the light came from the flashlight of one of the other officers or the headlights of his own vehicle as it was in the driveway (73).

Once Defendant was placed under arrest, he (the witness) placed Defendant in handcuffs (73). Defendant then said, "It was only weed, all I had was weed" (74).

Argument

I. To sustain a claim of ineffective assistance of counsel warranting new trial, a defendant must establish deficient performance on the part of his trial counsel, and also that there is a reasonable probability that, but for counsel's error, the jury would not have convicted him; the likelihood of a different result must be substantial, not just conceivable. While the two officers who testified that they saw Defendant throw a gun over the fence gave inconsistent testimony about the direction that Defendant ran in, both testified consistently with one another that Defendant ran to the rear of 19140 St. Marys. Defendant has not shown that had his trial counsel argued the inconsistency, the jury would have acquitted him.

A) Defendant's Claim

Defendant's first claim is that he was deprived of the effective assistance of counsel at trial where his trial counsel failed to argue to the jury that there was an inconsistency between the testimony of Officer Ibrahimovic and Officer Lewis, where Officer Ibrahimovic testified at trial that Defendant, when he turned around and saw him (Ibrahimovic) and his partner, ran westbound between the houses (Jury Trial Transcript, 01/16/13 (PM Session), 25), whereas Officer Lewis testified that Defendant ran eastbound, up the driveway to the rear of 19140 St. Marys (47).

B) Counterstatement of Standard of Review

The People accept Defendant's statement that the standard of review is the de novo standard. This standard applies because, as Defendant acknowledges, he did not move for a *Ginther* [*People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973)] hearing or a new trial on the basis of ineffective assistance of counsel, this Court's review, by necessity, is limited to the record. *People v Nantelle*, 215 Mich App 77, 87; 554 NW2d 667 (1996). Hence, this Court's review is de novo; see e.g. *Starr v Lockhart,* 23 F3d 1280, 1284 (CA 8, 1994), *cert den sub nom Norris v Starr,* 513 US 995; 115 S

Ct 499; 130 L Ed 2d 409 (1994) (review of questions of ineffective assistance of counsel based on undisputed record is de novo).

C) The People's Position

i) The law pertaining to claims of ineffective assistance of counsel

In *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994), the Michigan Supreme Court explained that when evaluating a claim of ineffective assistance of counsel under either the Sixth Amendment to the United States Constitution or under the equivalent provision of the Michigan Constitution, Michigan courts must examine the standard established in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[1] In order to establish ineffective assistance of counsel, the defendant must make two showings. First, he must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense.

Under the first requirement, defense counsel's performance must be measured against an objective standard of reasonableness, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and not counsel's subjective state of mind. *Harrington v Richter*, – US –; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *Id*. Furthermore, every effort must be made to eliminate the distorting effects of hindsight, and the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Hoag*, 460 Mich

[1] It would seem that more recent United States Supreme Court cases which cite and apply *Strickland*, one of which the People will be citing, would be applicable as well.

1, 6; 594 NW2d 57 (1999). In other words, hindsight cannot suffice for relief when counsel's choices were reasonable and legitimate based on predictions of how the trial would proceed. *Premo v Moore*, – US –; 131 S Ct 733, 745; 178 L Ed 2d 649 (2011), citing *Harrington v Richter*, *supra*, 131 S Ct at 770. Indeed, "[i]t is 'all too tempting to second-guess counsel's assistance after conviction or adverse sentence.' " *Id*., citing and quoting from *Strickland*, 466 US at 689; 104 S Ct at 2065. Thus, a court should neither substitute its judgment for that of defense counsel regarding trial strategy matters, nor evaluate counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Stated differently, even where review is de novo, the standard for judging counsel's representation has to be a most deferential one. *Premo v Moore*, 131 S Ct at 740. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, interacted with the client, with opposing counsel, and with the judge." *Id*. Furthermore,"[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practiced or most common custom." *Premo v Moore, supra*, 131 S Ct at 740. And finally, as far as the deficient performance prong, a court reviewing counsel's performance "is required not simply to "give [the] attorneys the benefit of the doubt," but to affirmatively entertain the range of possible "reasons . . . . counsel may have had for proceeding as they did." *Cullen v Pinholster*, – US –; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011), quoting from *Pinholster v Ayers*, 590 F3d 651, 692 (CA 9, 2009) (Kozinski, CJ, dissenting). *Strickland* does, after all, as noted previously, "call for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind." *Cullen, supra*, 131 S Ct at 1407, quoting from *Richter*, *supra*, 131 S Ct at 791.

Under the prejudice component, a court must conclude, upon a finding of deficient performance, that there is a reasonable probability that, absent the deficient performance, the factfinder would have had a reasonable doubt respecting guilt. *Pickens, supra,* 446 Mich at 312; *People v Poole,* 218 Mich App 702, 717; 555 NW2d 702 (1996). In other words, the defendant must show that there is a reasonable probability that, but for the deficient performance, the factfinder would not have convicted the defendant. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). At the very least, the likelihood of a different result must be substantial, not just conceivable. *Harrington v Richter, supra*, 131 S Ct at 792.

Finally, *Strickland* allows a reviewing court to dismiss an ineffectiveness claim under the prejudice prong without addressing the first prong of the test:

> Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.
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> *Strickland, supra,* 466 US at 697; 104 S Ct at 2069.

ii) Discussion

Certainly, Defendant's trial counsel could have pointed out to the jury in her closing argument the inconsistency between the testimony of Officer Ibrahimovic and that of Officer Lewis as to the direction that Defendant ran in when he (Defendant) turned around and saw them in their police vehicle. The question is whether this omission qualifies as constitutionally deficient performance. It does not, when the following language from *Harrington v Richter* is considered:

> *Strickland* does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 US at 687; 104 S Ct 2052 [at 2064] (quoting *McMann v Richardson*, 397 US 759, 770; 90 S Ct 1441 [1448]; 25 L Ed 2d 763 (1970)); see also *Gentry, supra* [*Yarborough v Gentry*], [540 US 1] at 7; 124 S Ct 1[at 5]. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. *Strickland, supra*, at 686; 104 S Ct 2052 [at 2064]. *Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.*
>
> 592 US at –; 131 S Ct at 791 (italics added).

Even if counsel's "failure" to point out the inconsistency between the testimonies of the two officers as to the direction that Defendant ran in did meet the first requirement of *Strickland*, Defendant has not shown that there is a reasonable probability that, had the inconsistency been argued to the jury, the jury would not have convicted him. This is so because while the two officers

did give inconsistent testimony about the direction that Defendant ran in, both testified consistently with one another that Defendant ran to the rear of 19140 St. Marys.[2] What the record suggests is nothing more than that one or the other of the officers had his directions mixed up. This was hardly the type of inconsistency that would cause a jury to have a reasonable doubt about their testimony overall.

[2] Although Officer Ibrahimovic did testify initially that Defendant ran to the rear of 19411 St. Marys (Jury Trial Transcript, 01/16/13 (PM Session), 26-27), he then testified that the gun was recovered from the rear of 19140 St. Marys (28). Officer Lewis testified that Defendant ran up the driveway of 19140 St. Marys (Transcript, supra, 47).

II. If a particular sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. Defendant did not raise his scoring issue in any these methods, and his minimum sentence of 24 months is within the Guidelines range that he argues is the correct range, that being 5 months to 46 months. There is no basis for setting aside Defendant's sentence.

A) Defendant's Claim

Defendant's second claim is that he was incorrectly scored 10 points for Offense Variable 13.

B) Counterstatement of Standard of Review

Because this claim was not raised at sentencing, in a motion for resentencing, or in a motion to remand, it will be the People's position, as will be discussed in the next section, that Defendant's claim has been waived. At a minimum, Defendant's claim should, as will also be discussed in the next section, only be considered under the plain error standard of review.

C) The People's Position

In *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), an offense variable was misscored, so the defendant's resulting minimum sentence exceeded the appropriate sentencing guidelines range. The defendant raised the scoring error for the first time in the Court of Appeals. *Id*., 470 Mich at 312. The Supreme Court held that because the defendant's sentence fell outside the appropriate guidelines range, his sentence was appealable, even though the scoring error was unpreserved. *Id*. Nonetheless, the defendant was required to satisfy the plain error standard set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Kimble, supra*, 470 Mich at at 312.

Kimble is distinguishable from this case for two reasons. First, Kimble's unpreserved scoring issue was appealable because his sentence fell outside the appropriate guidelines range. Here, Defendant's minimum sentence (24 months) is not only within what Defendant argues is the appropriate guidelines range (5 months to 46 months), it is also in the middle of that range. In *Kimble, supra,* 470 Mich at 310–311, the Supreme Court held that under MCL 769.34(10),"if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence *and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.*" (Emphasis added.) Again, Defendant did not raise the scoring error at sentencing, in a motion for resentencing, or in a motion to remand. Therefore, under *Kimble, supra,* Defendant's sentence is not appealable.

Second, because Defendant's trial counsel expressed her agreement that the range of 7 months to 46 months was the correct minimum range, Defendant's claim should be considered waived. A waiver extinguishes any error. *People v Carter,* 462 Mich 206, 215-216; 612 NW2d 144 (2000).

As far as Defendant's alternative claim of ineffective assistance of counsel, this alternative claim should not be considered inasmuch as this claim is not part of Defendant's statement of the issue. See *Lansing v Hartsuff,* 213 Mich App 338, 351; 539 NW2d 781 (1995); *People v Yarbrough,* 183 Mich App 163, 165; 454 NW2d 419 (1990).

III. In reviewing a sufficiency of the evidence claim, the reviewing court will give deference to the trier of fact's credibility choices. Three police officers testified that they saw Defendant throw a handgun over the wooden fence in the rear of 19140 St. Marys, and two of the police officers testified that Defendant took this handgun out of his right waistband. The evidence was sufficient to support Defendant's convictions.

A) Defendant's Claim

Defendant's next claim, which he sets forth in his Standard 4 Brief, is that the evidence was insufficient to convict him.

B) Counterstatement of Standard of Review

The People accept Defendant's statement that the standard of review is the de novo standard.

C) The People's Position

Three police officers testified that they saw Defendant throw a handgun over the wooden fence in that rear of 19140 St. Marys. Two of those police officers testified that Defendant took this handgun out of his right waistband. Such evidence was sufficient to support Defendant's convictions.

Defendant seems to be arguing that the testimony of the police officers should not have been believed.

"[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, *amended* 441 Mich 1201 (1992). Under this deferential standard of review, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People*

v Nowack, 462 Mich. 392, 400; 614 NW2d 78 (2000). The jury resolved the issue of credibility in favor of the police officers, and the credibility contest "will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

IV. A description of tangible evidence is the equivalent of the physical production of the evidence, and the failure to produce it goes at most to the weight of the evidence and the credibility of the witness describing it. Three police officers described the handgun that Defendant tossed over the wooden fence. Defendant's unpreserved due process/fair trial claim due to the nonproduction of the gun at trial does not entitle Defendant to any relief.

A) Defendant's Claim

Defendant's last claim in his Standard 4 Brief is that he was denied due process and a faire trial where the prosecution failed to provide physical evidence at trial, the physical evidence being the gun.

B) Counterstatement of Standard of Review

Defendant posed no objection at trial on this basis. Accordingly, review of this claim is by way of the plain error standard of review.

Under the plain error standard, the defendant has the burden of showing: 1) that error occurred, 2) that the error was plain, i.e., clear or obvious, 3) and that the plain error affected substantial rights; this generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. *People v Hawthorne,* 474 Mich 174, 181-182; 713 NW2d 724 (2006). Furthermore, once a defendant satisfies these three requirements, an appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Carines, supra,* 460 Mich at 763.

C) The People's Position

There was testimony at trial that the handgun recovered by the police was sent to the Michigan State Police Crime Lab, and that because this offense was not a high priority one, as would be a homicide for example, the Lab personnel did not get to it, due to the Lab's backlog. The handgun was still at the Crime Lab at the time of trial.

Even though the prosecution could have conceivably produced the handgun for trial, the fact is that the three eyewitness police officers described it. The absence of the handgun did not deprive Defendant of due process or a fair trial, nor does it make the evidence insufficient. See *Holle v State,* 25 Md 267; 337 A2d 163 (1975):

> It is not always necessary that tangible evidence be physically admitted at a trial. For example, if a felon commits a robbery with a deadly weapon, disposes of it before being apprehended, and it is not recovered, the corpus delicti of the crime may be proved on the testimony of the victim or an eyewitness that the robber used such a weapon. Even when evidence is available it need not be physically offered. Thus, the grand larceny of an automobile may be established merely on competent testimony describing the stolen vehicle without actually producing the automobile before the trier of fact. In such instances, the description of the tangible evidence is the equivalent of the physical production of the evidence, and the failure to produce it goes at most to the weight of the evidence and the credibility of the witness describing it. In other words, "(i)t is not necessary to produce, as distinguished from prove, the object of the crime." 1 Underhill's Criminal Evidence, s 35, at 62 (6th ed. 1973).
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> 25 Md at 274; 337 A2d at 166-167.

And from the fact the handgun was loaded, as the officers testified, it could be inferred that the handgun was operable. *York v State,* 56 Md App 222, 230 n 2; 467 A2d 552, 556 n 2 (1983).

Relief

Wherefore, the People respectfully request that this Honorable Court deny Defendant's Application for Leave to Appeal.

Respectfully submitted,

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